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MICHAEL ROBAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-5772

ANTHONY PASQUALL FARETTA,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases: *Page*

Illinois v. Allen, 397 U.S. 337 (1970) 4

People v. Carter, 66 Cal. 2d 666, 671 58 Cal. Rptr. 614, 427 P. 2d 214 (1967) 5

People v. Mattson, 51 Cal. 2d 777, 794, 336 P. 2d 937 (1959) 5

Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) 4

United States v. Abbamonte, 348 F. 2d 700 (2d Cir. 1965) 348 F. 2d, 704 (2d Cir. 1965) 5

United States v. Plattner, 330 F. 2d 271 . . . . . 4, 6

Other Authorities:

B. Schwartz, The Bill of Rights: A Documentary History 265, 323, 342, 377 (1971) 2

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Petitioner replies very briefly to certain points made in Respondent's Brief:

1. Respondent dwells at considerable length upon the English common-law experience (see Resp. Brief, at 17-25) but reaches no material conclusion at odds with Petitioner. The parties are in agreement that prior to 1836, persons accused of felonies did not enjoy a right to counsel and, therefore, self-representation was common. See Pet. Brief, at 33; Resp. Brief at 17-25.

2. The parties are in similar agreement as to the early American history. At the time of the adoption of

the Constitution, at least four states – Pennsylvania, Vermont, Massachusetts, and New Hampshire – expressly guaranteed the right of self-representation.[1] Delaware and Georgia soon adopted like provisions.[2] While other early charters did not expressly guarantee the right of self-representation (except to guarantee the right of confrontation, which Petitioner contends embraces the right of self-representation), Respondent has found nothing in the historical materials which would specifically evidence a deliberate decision by the framers of the various state charters to exclude self-representation.

3. With respect to history, then, the parties differ only in the inferences which they draw. Respondent argues that since some early charters expressly protected the right of self-representation, the failure of the framers to do so in the federal Constitution indicates a conscious decision to exclude it:

> The framers in adopting the Bill of Rights, did so with their eyes open. They must have been familiar with the states which had constitutions giving a state "right" to self-representation and they must have been familiar with the Judiciary Act which they were debating at the same time as the Bill of Rights which also provided for self-representation. Yet, in spite of this awareness, the framers of the Bill of Rights specifically

[1] 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 265, 323, 342, 377 (1971). Petitioner's opening brief inadvertently omitted Massachusetts from its enumeration of the states which guaranteed the right of self-representation, but Respondent correctly identifies that state as having such a provision. See Resp. Brief, at 27.

[2] See Pet. Brief, at 36 & n.25-26.

> mentioned only the right to counsel. The omission of any mention of the right to self-representation must have been purposeful. (Resp. Brief, at 30).

Yet Respondent concedes, as it must, that "the debates in Congress as to both the Judiciary Act and the Bill of Rights are bereft of discussion on this point". *Id.* Indeed, there is literally *nothing* in the pertinent historical materials to suggest, as Respondent urges, a conscious decision by the framers to empower the new government to *compel* a defendant to accept representation by counsel. Nor does history provide the slightest grounds upon which to speculate that the framers, had they debated the issue, might have sought to deny the right of self-representation. Significantly, Respondent has not cited a single instance, nor do we know of one, in which a defendant of that period was compelled to accept counsel and denied the right of self-representation.

In those circumstances, the prevalence of self-representation compels the opposite conclusion. At a time when the right of self-representation had simply never been threatened, and when in the perceptions of the period the principal issue was the securing of an additional right – a right to representation by counsel – history provides no warrant for a conclusion that the right of self-representation was deliberately excluded from the Constitution.

4. Moreover, we do not agree that, as Respondent urges, the Constitution is silent on the question. Rather, we think that the Sixth Amendment, in expressly guaranteeing "the accused" the right "to be confronted with witnesses against him" and "to have compulsory process for obtaining witnesses in his favor", provides

ample textual support for the right of self-representation.[3] Respondent argues in effect that the rights of confrontation and cross-examination are fully satisfied if exercised for the defendant by counsel. See Resp. Brief, at 41-42. This argument might, however, have been as appropriately addressed to the seeming absence of an explicit right to be present at one's trial; yet this Court has never hesitated to find that right implicit in the Confrontation Clause of the Sixth Amendment. *See, e.g., Illinois v. Allen,* 397 U.S. 337 (1970). If Respondent were correct in contending that the rights granted the defendant could be exercised by him through an attorney, then the Confrontation Clause would be an inappropriate foundation for the right to be present. The answer, of course, is that the Sixth Amendment entitles defendant to be present because the right of confrontation is *his* right to exercise:

> [I]t will be in his power, if present, to give advice or suggestions *or even to supersede his lawyers altogether and conduct the trial himself. (Snyder v. Massachusetts,* 291 U.S. 97, 106 (1934), emphasis added).

5. Respondent incorrectly attributes to Petitioner the argument that the Constitution requires the trial court to assist a defendant who represents himself and to appoint an advisory or standby counsel. Resp. Brief, at 48-49. We have very clearly stated that a trial judge is obligated to do neither. See Pet. Brief, at 54-55. Of

[3]Citation of the Confrontation and Compulsory Process Clauses is not to quarrel with those, the Second Circuit among them, who view the right of self-representation also included within the right-to-counsel clause of the Sixth Amendment. *See, e.g., United States v. Plattner,* 330 F.2d 271, 274 (2d. Cir. 1964).

course, the trial judge *may* assist the defendant; and many trial judges will. See Pet. Brief, at 55. Likewise, the trial judge *may* appoint a standby counsel. See Pet. Brief, at 55-56. That course has been generally endorsed by courts and commentators alike (see authorities cited at *id.* 56), including the American Bar Association Project on Standards for Criminal Justice. California law unquestionably permits a trial judge to do so. *See, e.g., People v. Carter,* 66 Cal.2d 666, 671, 58 Cal.Rptr.614, 427 P.2d 214 (1967); *People v. Mattson,* 51 Cal.2d 777, 794, 336 P.2d 937 (1959).

6. Finally, Respondent urges that in any event denial of the right of self-representation should be measured by a harmless error test. Respondent incorrectly contends that the Second Circuit has endorsed this view.[4] That court has unequivocally held to the

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[4] *United States v. Abbamonte,* 348 F.2d 700 (2d Cir. 1965), is cited by Respondent as holding that denial of the right of self-representation can be harmless error; that is erroneous. In that case, the defendant (who had in various ways engaged in conduct which appeared to be dilatory) sought a continuance on the day of trial for the ostensible purpose of obtaining a new lawyer. Although the defendant, following the trial court's denial of the continuance, purported to discharge his counsel, the Court of Appeals held that the trial court was entitled to view his conduct as involving an attempt to obtain a continuance and that in fact the defendant did not desire to proceed without counsel. 348 F.2d, at 704. The Court of Appeals simply held, then, that on the facts presented the case did not involve a genuine desire and demand for self-representation. In passing, the Court of Appeals indicated that its conclusion was reinforced by the excellent representation afforded by counsel and the defendant's evident satisfaction with it.

contrary. *United States v. Plattner, supra,* note 3, at 273.

DATED: October 18, 1974

Respectfully submitted,

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